

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

\* \* \*

ARNOLD ANDERSON,

Plaintiff,

Case No. 2:17-cv-00808-APG-GWF

C. PASTUNA, *et al.*,

## Defendants.

## **REPORT AND RECOMMENDATION**

12 This matter comes before the Court on the screening of Plaintiff's First Amended  
13 Complaint. Also before the Court is Defendants Officer Jason Auschwitz, Officer Keith Bryant,  
14 and Officer Gilberto Valenzuela's Motion to Dismiss Plaintiff's *Monell* Claim (ECF No. 18), filed  
15 on February 19, 2019.

## **BACKGROUND**

17 On March 17, 2017, Plaintiff filed an Application for Leave to Proceed *In Forma Pauperis*  
18 (ECF No. 1). On June 25, 2018, the Court granted his Application for Leave to Proceed *In Forma*  
19 *Pauperis* and screened his Complaint pursuant to 28 U.S.C. § 1915A(a). *See* ECF No. 3. The  
20 Court allowed Plaintiff's claim for violation of his Fourth Amendment rights based on a  
21 warrantless arrest issued without probable cause to proceed against Defendants Pastuna,  
22 Auschwitz, Bryant, and Valenzuela in their individual capacity. *Id.* The Court recommended that  
23 Plaintiff's claims against Defendant District Attorney Binu Palal be dismissed with prejudice due  
24 to Plaintiff's failure to state a claim for which relief can be granted. On August 3, 2018, the Court  
25 accepted the undersigned's recommendation. *See* ECF No. 9. Further, the Court dismissed  
26 without prejudice Plaintiff's claim against Defendants Pastuna, Auschwitz, Bryant, and  
27 Valenzuela, in their official capacity, for failing to demonstrate that any constitutional violations  
28 occurred as a result of an official policy or custom, and granted Plaintiff leave to file an amended

1 complaint correcting noted deficiencies by July 23, 2018. On February 19, 2019, Defendants filed  
 2 their motion to dismiss Plaintiff's *Monell* claim. ECF No. 18. Defendants argue that Plaintiff  
 3 failed to support his allegation that Defendants is liable under 28 U.S.C. §1983 because Plaintiff  
 4 did not show that Defendants promulgated a policy, practice, custom or scheme that was the cause  
 5 of a violation to Plaintiff's constitutional rights.

6 **DISCUSSION**

7 Upon granting a request to proceed in forma pauperis and granting leave to amend, a court  
 8 must additionally screen a complaint pursuant to 28 U.S.C. §1915(e). Specifically, federal courts  
 9 are given the authority to dismiss a case if the action is legally "frivolous or malicious," fails to  
 10 state a claim upon which relief may be granted, or seeks monetary relief from a defendant/third  
 11 party plaintiff who is immune from such relief. 28 U.S.C. § 1915(e)(2). A complaint, or portion  
 12 thereof, should be dismissed for failure to state a claim upon which relief may be granted "if it  
 13 appears beyond a doubt that the plaintiff can prove no set of facts in support of his claims that  
 14 would entitle him to relief." *Buckey v. Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992). A complaint may be dismissed as frivolous if it is premised on a nonexistent legal interest or  
 15 delusional factual scenario. *Neitzke v. Williams*, 490 U.S. 319, 327–28 (1989). Moreover, "a  
 16 finding of factual frivolousness is appropriate when the facts alleged rise to the level of the  
 17 irrational or the wholly incredible, whether or not there are judicially noticeable facts available to  
 18 contradict them." *Denton v. Hernandez*, 504 U.S. 25, 33 (1992).

20 When a court dismisses a complaint under § 1915(e), the plaintiff should be given leave to  
 21 amend the complaint with directions as to curing its deficiencies, unless it is clear from the face of  
 22 the complaint that the deficiencies could not be cured by amendment. *See Cato v. United States*,  
 23 70 F.3d 1103, 1106 (9th Cir. 1995). In its order and report and recommendation (ECF No. 3), the  
 24 Court gave Plaintiff leave to amend the noted deficiencies of his complaint and informed Plaintiff  
 25 that pursuant to Local Rule 15-1, the Court could not refer to a prior pleading in order to make his  
 26 amended complaint complete. In its report and recommendation (ECF No. 3), the Court reiterated  
 27 to Plaintiff that he could not refer to prior pleadings and that Plaintiff must sufficiently allege each  
 28 claim and the involvement of each defendant.

1           **I.     Screening the Instant Complaint**

2           42 U.S.C. § 1983 creates a path for the private enforcement of substantive rights created  
 3 by the Constitution and Federal Statutes. *Graham v. Connor*, 490 U.S. 386, 393-94 (1989). To  
 4 the extent that Plaintiff is seeking to state a claim under § 1983, a plaintiff “must allege the  
 5 violation of a right secured by the Constitution and the laws of the United States, and must show  
 6 that the alleged deprivation was committed by a person acting under color of law.” *West v.*  
 7 *Atkins*, 487 U.S. 42, 48-49 (1988). A person acts under “color of law” if he “exercise[s] power  
 8 possessed by virtue of state law and made possible only because the wrongdoer is clothed with  
 9 the authority of state law.” *West*, 487 U.S. at 49.

10           **a.     Municipal Entity Liability Under § 1983 – *Monell* Claim**

11           To the extent that Plaintiff intends to set forth civil rights claims under § 1983, he must  
 12 plead that the defendant (1) acted “under color of state law” and (2) “deprived the plaintiff of rights  
 13 secured by the Constitution or federal statutes.” *Gibson v. U.S.*, 781 F.2d 1334, 1338 (9th Cir.  
 14 1986); *see also West v. Atkins*, 487 U.S. 42, 48 (1988); *Long v. County of Los Angeles*, 442 F.3d  
 15 1178, 1185 (9th Cir. 2006). Once the plaintiff alleges that his federal rights have been violated,  
 16 then a plaintiff must show that those rights were violated by a person acting under *color of state*  
 17 law. Persons acting under color of state law typically include officials who in some capacity  
 18 represent either the state, city or county government. *See Monroe v. Pape*, 365 U.S. 167 (1961),  
 19 *partially overruled on other grounds by Monell v. Department of Social Services of City of New*  
 20 *York*, 436 U.S. 658, 663 (1978).

21           For purposes of bringing a § 1983 claim, under relatively narrow and specific  
 22 circumstances, a “person” can also include a municipality such as a town, city, or one of its bodies  
 23 such as the police or fire department. *Monell*, 436 U.S. at 663. Further, “[a] suit against a  
 24 governmental officer in his official capacity is equivalent to a suit against the governmental entity  
 25 itself.” *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991). Official-capacity suits  
 26 are “another way of pleading an action against an entity of which an officer is an agent.” *Monell*,  
 27 436 U.S. at 690, fn 55. A plaintiff can bring a § 1983 action against a local government entity if  
 28 the plaintiff can show that the entity had an established policy or custom that caused employees

1 who implemented the policy or custom to violate the constitutional rights of others. *Monell*, 436  
 2 U.S. at 690–92; *see also, Van Ort v. Estate of Stanewich*, 92 F. 3d 831 (9th Cir. 1996). However,  
 3 absent such a policy or custom, a local government entity cannot be held liable solely because one  
 4 of its employees commits an unlawful wrong against another. *Id.* at 691. In other words, under  
 5 *Monell*, when a municipal policy of some nature is the “driving force” behind an unconstitutional  
 6 action taken by municipal employees, the municipality will be liable. *Id.*

7 Plaintiff alleges that Defendants Pastuna, Auschwitz, Bryant, and Valenzuela violated his  
 8 constitutional rights by failing to conduct a proper investigation regarding a criminal shooting in  
 9 which Plaintiff was the prime suspect. He alleges that the officers falsified documents, conducted  
 10 an illegal identification line up, and violated his due process and equal protection rights. Plaintiff,  
 11 however, fails to allege sufficient facts to support a *Monell* claim against the defendant officers.  
 12 Although he identifies the constitutional violation or civil right under which he brings his claim,  
 13 Plaintiff does not demonstrate what policy or custom the municipal entity implemented that was  
 14 the driving force behind the officers’ alleged conduct. A policy “is a course of action consciously  
 15 chosen from among various alternatives. *Guarino v. Las Vegas Metro. Police Dep’t*, 2014 WL  
 16 12791070, at \*3 (D. Nev. July 21, 2014) (citing *City of Oklahoma City v. Tuttle*, 471 U.S. 808,  
 17 823 (1985)). For example, policies may take the form of an express policy, an unwritten policy or  
 18 custom established so that it has the force or law, an act of the municipality’s chief policymaker,  
 19 or a municipality’s failure to train its officers. *Guarino*, 2014 WL 12791070, at \*3.

20 The Court recommends that Defendants’ motion to dismiss be granted and that Plaintiff’s  
 21 amended complaint alleging a *Monell* claim be dismissed without prejudice. The Court further  
 22 recommends that Plaintiff be permitted another opportunity to amend his complaint to correct the  
 23 noted deficiencies regarding his *Monell* claim. Failure to do so, however, will result in a  
 24 recommendation to the District Judge that his claims against Defendants Pastuna, Auschwitz,  
 25 Bryant, and Valenzuela, in their official capacity, be dismissed with prejudice. Plaintiff is once  
 26 again advised that his second amended complaint must be complete in and of itself and the Court  
 27 will not refer to any other pleading. Once Plaintiff files a second amended complaint, the original  
 28 pleadings no longer serves any function in the case. Plaintiff is further advised that litigation has

1 not yet and will not commence upon the filing of a second amended complaint. Rather, the Court  
 2 will need to conduct an additional screening of the amended complaint pursuant to 28 U.S.C. §  
 3 1915(e). Accordingly,

4 **RECOMMENDATION**

5 **IT IS HEREBY RECOMMENDED** that Officer Jason Auschwitz, Officer Keith  
 6 Bryant, and Officer Gilberto Valenzuela's Motion to Dismiss Plaintiff's *Monell* Claim (ECF No.  
 7 18) be **granted** and that Plaintiff's amended complaint alleging a *Monell* claim be dismissed,  
 8 without prejudice.

9 **IT IS FURTHER RECOMMENDED** that Plaintiff's amended claim against  
 10 Defendants Pastuna, Auschwitz, Bryant, and Valenzuela be dismissed with leave to amend and  
 11 that Plaintiff be permitted to file a second amended complaint correcting the noted deficiencies  
 12 by a date to be set by the District Judge if the undersigned's report and recommendation is  
 13 accepted.

14 Dated this 16th day of April, 2019.

15  
 16   
 17 GEORGE FOLEY, JR.  
 18 UNITED STATES MAGISTRATE JUDGE

19 **NOTICE**

20 Under Local Rule IB 3-2, any objection to this Finding and Recommendation must be in  
 21 writing and filed with the Clerk of the Court within fourteen (14) days. Appeals may be  
 22 waived due to the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S.  
 23 140, 142 (1985). Failure to file objections within the specified time or failure to properly address  
 24 and brief the objectionable issues waives the right to appeal the District Court's order and/or  
 25 appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157  
 26 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

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